

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

9 VICKIE M. DETTLING,)
10 Plaintiff,) No. CV-06-0106-MWL
11 v.)
12 JO ANNE B. BARNHART,) ORDER GRANTING DEFENDANT'S
13 Commissioner of Social) MOTION FOR SUMMARY JUDGMENT
14 Security,)
15 Defendant.)
16)

16 BEFORE THE COURT are the parties' cross-motions for summary
17 judgment. (Ct. Rec. 16, 20). The case was noted for hearing
18 without oral argument on October 23, 2006. (Ct. Rec. 13).
19 Plaintiff Vickie Dettling ("Plaintiff") filed a reply brief on
20 October 16, 2006. (Ct. Rec. 22). Attorney Kenneth L. Isserlis
21 represents Plaintiff; Special Assistant United States Attorney
22 David R. Johnson represents the Commissioner of Social Security
23 ("Commissioner"). The parties have consented to proceed before a
24 magistrate judge. (Ct. Rec. 5). After reviewing the
25 administrative record and the briefs filed by the parties, the
26 Court **GRANTS** Defendant's Motion for Summary Judgment (Ct. Rec. 20)
27 and **DENIES** Plaintiff's Motion for Summary Judgment. (Ct. Rec. 16).

JURISDICTION

2 On June 19, 1998, Plaintiff protectively filed an application
3 for SSI disability benefits. (Administrative Record ("AR") 131-
4 134). The application was denied initially and on
5 reconsideration. (AR 106-109, 112-114.) The first hearing on
6 Plaintiff's claim was held on December 15, 1999. (AR 54-103). In a
7 decision dated December 29, 2000, the ALJ denied plaintiff's
8 claim. (AR 25-48). Following an appeal, the Court granted
9 Plaintiff's Motion for Summary Judgment and remanded for further
10 proceedings. (AR 1329-1349).

11 Plaintiff also filed for benefits on March 13, 2001. (AR
12 1001-1003). Following a second hearing held on November 4 and
13 November 13, 2002 (AR 1473-1519, 1521-1576), this claim was also
14 denied by an ALJ on October 10, 2003. (AR 1309-1319, 634 n. 1).
15 While a request for review of the second application was pending
16 before the Appeals Council, an ALJ conducted a third hearing on
17 November 13, 2003, pursuant to the Court's remand order. (AR 1523-
18 1575). In a decision dated November 22, 2004, the ALJ found that
19 plaintiff was disabled as of September 5, 2003, but not as of June
20 19, 1998, as she alleged.¹ (AR 638). The ALJ found that from June
21 19, 1998 until September 4, 2003, plaintiff was able to perform
22 her past relevant work as a teacher and as a secretary and
23 therefore was not disabled during this time. (AR 638-639). The
24 Appeals Council consolidated both applications and refused to

1 assume jurisdiction because the partially favorable decision
2 resolved both claims. (AR 1385-1386, 612-616). Therefore the third
3 ALJ decision became the final decision of the Commissioner, which
4 is appealable to the district court pursuant to 42 U.S.C.
5 § 405(g). Plaintiff filed this action for judicial review
6 pursuant to 42 U.S.C. § 405(g) on April 13, 2006. (Ct. Rec. 1).

7 **STATEMENT OF FACTS**

8 The facts have been presented in the administrative hearing
9 transcripts, the ALJ's decisions, the briefs of both plaintiff and
10 the Commissioner and will only be summarized here.

11 Plaintiff was 55 years old on the date of the most recent
12 ALJ's decision. (AR 633). Her educational background includes
13 attending four years of college and earning a bachelor's degree in
14 the Philippines. Plaintiff majored in English. (AR 62-63). From
15 1990 to 1992, plaintiff earned an associates degree in Human
16 Services at Spokane Falls Community College. (AR 62). Her past
17 relevant work consists of teaching English as a second language in
18 Korea and working as a secretary. (AR 66, 72-73). Plaintiff
19 alleges disability since June 19, 1998, due to low back and joint
20 pain, foot pain, shingles and depression/feelings of loneliness.
21 (AR 131-134,140). Plaintiff also alleged right shoulder injury,
22 imbalance and poor memory. (AR 1010).

23 **SEQUENTIAL EVALUATION PROCESS**

24 The Social Security Act (the "Act") defines "disability" as
25 the "inability to engage in any substantial gainful activity by
26 reason of any medically determinable physical or mental impairment
27 which can be expected to result in death or which has lasted or
28 can be expected to last for a continuous period of not less than

1 twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The
2 Act also provides that a plaintiff shall be determined to be under
3 a disability only if any impairments are of such severity that a
4 plaintiff is not only unable to do previous work but cannot,
5 considering plaintiff's age, education and work experiences,
6 engage in any other substantial gainful work which exists in the
7 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).
8 Thus, the definition of disability consists of both medical and
9 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156
10 (9th Cir. 2001).

11 The Commissioner has established a five-step sequential
12 evaluation process for determining whether a person is disabled.
13 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person
14 is engaged in substantial gainful activities. If so, benefits are
15 denied. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If
16 not, the decision maker proceeds to step two, which determines
17 whether plaintiff has a medically severe impairment or combination
18 of impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii),
19 416.920(a)(4)(ii).

20 If plaintiff does not have a severe impairment or combination
21 of impairments, the disability claim is denied. If the impairment
22 is severe, the evaluation proceeds to the third step, which
23 compares plaintiff's impairment with a number of listed
24 impairments acknowledged by the Commissioner to be so severe as to
25 preclude substantial gainful activity. 20 C.F.R. §§
26 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P
27 App. 1. If the impairment meets or equals one of the listed
28 impairments, plaintiff is conclusively presumed to be disabled.

1 If the impairment is not one conclusively presumed to be
2 disabling, the evaluation proceeds to the fourth step, which
3 determines whether the impairment prevents plaintiff from
4 performing work which was performed in the past. If a plaintiff
5 is able to perform previous work, that plaintiff is deemed not
6 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv).
7 At this step, plaintiff's residual functional capacity ("RFC")
8 assessment is considered. If plaintiff cannot perform this work,
9 the fifth and final step in the process determines whether
10 plaintiff is able to perform other work in the national economy in
11 view of plaintiff's residual functional capacity, age, education
12 and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),
13 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

14 The initial burden of proof rests upon plaintiff to establish
15 a *prima facie* case of entitlement to disability benefits.

16 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971); *Meanel v.*
17 *Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial burden is
18 met once plaintiff establishes that a physical or mental
19 impairment prevents the performance of previous work. The burden
20 then shifts, at step five, to the Commissioner to show that (1)
21 plaintiff can perform other substantial gainful activity and (2) a
22 "significant number of jobs exist in the national economy" which
23 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th
24 Cir. 1984).

25 **STANDARD OF REVIEW**

26 Congress has provided a limited scope of judicial review of a
27 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold
28 the Commissioner's decision, made through an ALJ, when the

1 determination is not based on legal error and is supported by
 2 substantial evidence. *See Jones v. Heckler*, 760 F.2d 993, 995
 3 (9th Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir.
 4 1999). "The [Commissioner's] determination that a plaintiff is
 5 not disabled will be upheld if the findings of fact are supported
 6 by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572
 7 (9th Cir. 1983) (*citing* 42 U.S.C. § 405(g)). Substantial evidence
 8 is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d
 9 1112, 1119 n. 10 (9th Cir. 1975), but less than a preponderance.
 10 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir. 1989);
 11 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d
 12 573, 576 (9th Cir. 1988). Substantial evidence "means such
 13 evidence as a reasonable mind might accept as adequate to support
 14 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)
 15 (*citations omitted*). "[S]uch inferences and conclusions as the
 16 [Commissioner] may reasonably draw from the evidence" will also be
 17 upheld. *Mark v. Celebreeze*, 348 F.2d 289, 293 (9th Cir. 1965).
 18 On review, the Court considers the record as a whole, not just the
 19 evidence supporting the decision of the Commissioner. *Weetman v.*
 20 *Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989) (*quoting* *Kornock v.*
 21 *Harris*, 648 F.2d 525, 526 (9th Cir. 1980)).

22 It is the role of the trier of fact, not this Court, to
 23 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If
 24 evidence supports more than one rational interpretation, the Court
 25 may not substitute its judgment for that of the Commissioner.
 26 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579
 27 (9th Cir. 1984). Nevertheless, a decision supported by
 28 substantial evidence will still be set aside if the proper legal

1 standards were not applied in weighing the evidence and making the
 2 decision. *Brawner v. Secretary of Health and Human Services*, 839
 3 F.2d 432, 433 (9th Cir. 1987). Thus, if there is substantial
 4 evidence to support the administrative findings, or if there is
 5 conflicting evidence that will support a finding of either
 6 disability or nondisability, the finding of the Commissioner is
 7 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir.
 8 1987).

9 **ALJ'S FINDINGS**

10 The ALJ found at step one that plaintiff has not engaged in
 11 substantial gainful activity during the relevant period of time.
 12 (AR 633). At step two, the ALJ incorporated the findings of the
 13 previous two ALJ's decisions with respect to plaintiff's
 14 impairments. (AR 634, 636). He found that plaintiff suffers from
 15 the severe impairments of musculoskeletal pain, mental impairment,
 16 and psoriasis. (AR 636). The ALJ found that prior to September 5,
 17 2003, plaintiff did not have an impairment or combination of
 18 impairments listed in or medically equal to one of the Listings
 19 impairments.² (AR 636).

20 The ALJ concluded that plaintiff had the RFC to perform a
 21 limited range of light exertion work. (AR 638). He specifically
 22 found that, prior to September 5, 2003, plaintiff was limited to
 23 lifting up to 20 pounds occasionally and 10 pounds frequently; she
 24 could not work at or above shoulder level on the right side. (AR

25
 26 ² The ALJ found that as of September 5, 2003, plaintiff's skin
 27 impairment met the criteria of section 8.05 of the impairments listed in
 28 Appendix 1, Subpart P of the regulations (20 CFR, Part 404). (AR 636). The
 ALJ observed that on September 5, 2003, plaintiff was admitted to the hospital
 with a fever, skin eruptions and pustules on her lower extremities and
 abdominal wall. She was diagnosed with dehydration and pustular psoriasis
 pyoderma and discharged ten days later. (AR 634-635).

1 638). The ALJ incorporated the findings of the previous two ALJ
2 decisions with respect to plaintiff's mental impairments, and
3 found that plaintiff's mental impairment results in a mild
4 restriction of the activities of daily living, mild difficulties
5 in maintaining social functioning, and moderate deficiencies of
6 concentration, persistence or pace, each of extended duration, and
7 no episodes of decompensation. (AR 636). The ALJ found that these
8 limitations precluded plaintiff's ability to engage in work
9 requiring quotas or prolonged concentration. (AR 638).

10 At step four of the sequential evaluation process, the ALJ
11 found that plaintiff retained the RFC to perform her past relevant
12 work as a secretary or teacher. (AR 638). Accordingly, the ALJ
13 determined at step four of the sequential evaluation process that
14 plaintiff was not disabled within the meaning of the Social
15 Security Act prior to September 5, 2003. (AR 638).

16 **ISSUES**

17 Plaintiff contends that the ALJ erred as a matter of law.
18 Specifically, she argues that the ALJ erred by (1) relying on the
19 opinion of Jay M. Toews, Ed.D.; (2) finding plaintiff not fully
20 credible; (3) determining her RFC; and (4) finding that plaintiff
21 is able to perform her past relevant work. (Ct. Rec. 17, p. 35).

22 The Commissioner responds that the ALJ's decision finding
23 that plaintiff was not disabled until September 5, 2003, is
24 supported by substantial evidence and free of legal error. (Ct.
25 Rec. 21, p. 7).

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27
28

DISCUSSION

A. Dr. Toews' opinion

3 Plaintiff contends that the ALJ erred by relying on Dr.
4 Toews' report because it fails to meet professional standards. She
5 also contends that the ALJ improperly relied on the report to
6 discredit plaintiff's physical complaints. (Ct. Rec. 17, pp. 35-
7 37). The Commissioner responds that: (1) Dr. Toews' opinion of
8 highly probable malingering met professional standards; (2) a
9 clinical diagnosis of malingering is not required when assessing
10 credibility, and (3) the ALJ could properly infer that the lack of
11 credibility shown by probable malingering undermines the veracity
12 of plaintiff's claims of physical pain. (Ct. Rec. 21, pp. 8-12).

13 In the most recent ALJ decision (entered November 22, 2004),
14 Richard Hines observed that the Court's June 4, 2003 remand order
15 instructed the Commissioner to provide plaintiff's counsel with
16 Dr. Toews' raw data for review, and to hold a supplemental hearing
17 where plaintiff's counsel could cross-examine Dr. Toews. (AR 632).

18 ALJ Hines noted that on November 13, 2003, at the
19 supplemental hearing, Dr. Toews provided the raw data from his
20 July 7, 2000 examination of plaintiff and was subject to cross-
21 examination. (AR 634, 637). The ALJ noted Dr. Toews' testimony in
22 response to questioning from plaintiff's counsel that he did not
23 find every claimant to be malingering, that he examined but did
24 not treat plaintiff, and he observed no lack of cooperation. ALJ
25 Hines observed that Dr. Toews diagnosed plaintiff as highly
26 probable for malingering based on the results of the following
27 tests: the Portland Digit Recognition Test, the Trailmaking A, the
28 elevated MMPI-2 and the Wexler Memory Scale -III. (AR 637). The

1 ALJ took note of Dr. Toews' acknowledgment that there was no way
2 to be certain that plaintiff was malingering, and that the record
3 contains no other indication of malingering. ALJ Hines noted that
4 Dr. Toews based his opinion on the objective findings. (AR 637).
5 The ALJ observed Dr. Toews' testimony that he read all of the
6 plaintiff's files that he received, his opinion was not based on
7 plaintiff's race, and the secondary gain plaintiff may have been
8 seeking could be something more than money, such as attention,
9 affection, nurturing, support or avoidance. ALJ Hines pointed out
10 Dr. Toews' testimony that his MMPI test result was the only one in
11 the record. (AR 637). The ALJ specifically stated that he based
12 his credibility assessment of plaintiff (more fully outlined
13 below) on more than Dr. Toews' finding of probable malingering.
14 (AR 637). ALJ Hines also assessed credibility based on
15 plaintiff's failure to follow through with physical therapy for
16 back pain; on her refusal to implement a physical fitness program
17 to benefit back pain and fibromyalgia; on her ability to fly from
18 Washington to Texas despite testifying that she can only sit for 5
19 minutes;³ on her ability to drive; and on progress notes related
20 to treatment for depression indicating that she was functioning
21 fairly well and participating in various activities. (AR 637). As
22 indicated, in the most recent decision the ALJ incorporated the
23 findings of the previous two ALJ decisions.

24 Plaintiff contends that the ALJ erred by crediting Dr. Toews'
25 report because it does not meet professional standards. Plaintiff
26 cites 20 C.F.R. § 416.919n(b): "The conclusions in a consultative
27

28 ³The ALJ noted that plaintiff had again been able to fly to Texas from
Washington. She had flown to Texas in 2001. (AR 1316).

1 examination report 'must conform to professional standards.'''
2 (Ct. Rec. 17, p. 36). Plaintiff argues that to properly diagnosis
3 malingering, preliminary evidence of suspected malingering must be
4 confirmed by appropriate additional testing. (Ct. Rec. 17, p. 36).
5 As support plaintiff cites a November 19, 2000, letter by Andrew
6 Haffey, Ph.D., stating: "in my opinion, the diagnosis of
7 malingering carries a large burden of proof. I believe that the
8 community standard . . . has evolved to demand multiple
9 observations of the individual, gathering of collateral
10 information from sources other than medical professionals and the
11 exhaustive ruling out of other disorders such as a somatoform
12 disorder or a factitious disorder such as Munchausen's syndrome."
13 (AR 603).

14 Plaintiff cites W. Scott Mabee, Ph.D.,'s October 29, 2003
15 letter as further support for discrediting Dr. Toews' report. (Ct.
16 Rec. 17, p. 36, AR 767-768). The ALJ observed that Dr. Mabee
17 opines, in essence, that the diagnosis of malingering is difficult
18 to make and not always reliable, and Dr. Toews' diagnosis is based
19 on limited evidence and was not confirmed by a subsequent adequate
20 assessment. (AR 635, AR 769).

21 The test of *Cotton v. Bowen*, 799 F. 2d 1403 (9th Cir. 1996),
22 requires that a plaintiff produce objective medical evidence of
23 impairments and show that the impairments could reasonably be
24 expected to produce some degree of the alleged symptoms. The ALJ
25 may then reject the plaintiff's testimony only upon (1) finding
26 evidence of malingering, or (2) expressing clear and convincing
27 reasons for doing so. *Cotton*, 799 F. 2d at 1407. Absent evidence
28 of malingering, an ALJ is required to state which symptom

1 testimony is found not credible with enough specificity to allow a
2 reviewing court to confirm that the testimony was rejected on
3 permissible grounds and not arbitrarily. *See Benton*, 331 F. 3d
4 1030, 1040-1041 (9th Cir 2003).

5 It is the ALJ who determines credibility and resolves
6 conflicts and ambiguity in the medical and non-medical evidence.
7 *Morgan v. Comissioner*, 169 F.3d 595, 599 (9th Cir. 1999). When
8 reviewing the ALJ's decision, the Court must uphold the decision
9 if the findings of fact are supported by substantial evidence.
10 *Delgado v. Heckler*, 722 F.2d 570, 572 (9th Cir. 1983) (citing 42
11 U.S.C. § 405(g)). Moreover, the Court must ultimately uphold the
12 ALJ's decision where the evidence is susceptible to more than one
13 rational interpretation. *Magallanes v. Bowen*, 881 F.2d 747, 750
14 (9th Cir. 1989). It is not the role of the Court to second-guess
15 the ALJ. If evidence supports more than one rational
16 interpretation, the court must uphold the decision of the ALJ.
17 *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).

18 The undersigned judicial officer finds that the ALJ properly
19 considered Dr. Toews' report. Plaintiff fails to establish that
20 Dr. Toews' conclusions are not in conformity with professional
21 standards. With respect to the opinions of Drs. Haffey and Mabee
22 that additional tests were required before diagnosing malingering,
23 Dr. Toews testified that although other tests similar to the
24 Portland Digit Recognition are available, they are all forced
25 choice tests and he does not know anyone who uses all of them. (AR
26 1538). The record reveals that the ALJ carefully considered the
27 opinions of Drs. Haffey, Mabee and Toews and found that Dr. Toews'
28 assessment was only one of numerous reasons that he found

1 plaintiff less than fully credible. (AR 635, 637).

2 Plaintiff argues that even if the ALJ could properly consider
3 Dr. Toews' opinion of probable malingering, it was improper to use
4 it to discount the severity of plaintiff's physical symptoms. (Ct.
5 Rec. 17, pp. 36-37). The Commissioner responds that the ALJ could
6 properly consider the evidence of probable malingering as
7 impugning plaintiff's credibility with respect to claimed physical
8 limitations. (Ct. Rec. 21, pp. 11-12). When weighing the
9 claimant's credibility, the ALJ may consider at least the
10 following factors: "[claimant's] reputation for truthfulness,
11 inconsistencies either in [claimant's] testimony or between [her]
12 testimony and [her] conduct, [claimant's] daily activities, [her]
13 work record, and testimony from physicians and third parties
14 concerning the nature, severity, and effect of the symptoms of
15 which [claimant] complains." *Thomas v. Barnhart*, 278 F. 3d 947,
16 958-959 (9th Cir. 2002), citing *Light v. Soc. Sec. Admin.*, 119 F.
17 3d 789, 792 (9th Cir. 1997). The *Thomas* court affirmed the ALJ's
18 credibility determination, finding that, in addition to no
19 objective medical evidence supporting Ms. Thomas' descriptions of
20 her pain and limitations, the ALJ properly relied on her ability
21 to perform household chores such as cooking, laundry, washing
22 dishes and shopping, and on her history as an unreliable historian
23 with respect to substance abuse. The Court noted that the ALJ
24 inferred "that this lack of candor carries over to her description
25 of physical pain." The Court noted that even more compelling was
26 the ALJ's finding that plaintiff failed to give maximum or
27 consistent effort during two physical capacity evaluations,
28 interpreted by the ALJ as arguing "strongly as to her lack of

1 credibility." *Thomas*, 278 F. 3d at 959.

2 Similarly, the ALJ in this case properly considered
3 plaintiff's responses to the tests administered by Dr. Toews,
4 along with other evidence discussed herein, when he determined
5 that plaintiff was less than fully credible in her complaints of
6 pain and in the degree of limitation she described.

7 **B. Plaintiff's Credibility**

8 Plaintiff argues that the ALJ erred by failing to present
9 clear and convincing reasons for rejecting her testimony. (Ct.
10 Rec. 17, pp. 37-40). The Commissioner responds that the ALJ
11 properly relied on Dr. Toews' finding of probable malingering,
12 plaintiff's activities of daily living, her inconsistent
13 subjective complaints and descriptions of limitations, and
14 inconsistent follow through with treatment recommendations when he
15 assessed credibility. (Ct. Rec. 21, pp. 8-18). It is the province
16 of the ALJ to make credibility determinations. *Andrews v.*
17 *Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). However, the ALJ's
18 findings must be supported by specific cogent reasons. *Rashad v.*
19 *Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990). Once the claimant
20 produces medical evidence of an underlying impairment, the ALJ may
21 not discredit testimony as to the severity of an impairment
22 because it is unsupported by medical evidence. *Reddick v. Chater*,
23 157 F.3d 715, 722 (9th Cir. 1998) (citation omitted). Absent
24 affirmative evidence of malingering, the ALJ's reasons for
25 rejecting the claimant's testimony must be "clear and convincing."
26 *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995). "General
27 findings are insufficient: rather the ALJ must identify what
28 testimony is not credible and what evidence undermines the

1 claimant's complaints." *Lester*, 81 F.3d at 834; *Dodrill v.*
2 *Shalala*, 12 F.3d 915, 918 (9th Cir. 1993).

3 Plaintiff contends that the ALJ failed to make adequate
4 credibility findings because he failed to cite to the record with
5 respect to each finding. (Ct. Rec. 17, p. 38). The Commissioner
6 responds that as long the ALJ refers generally to a basis in the
7 record sufficient to permit review, the ALJ has satisfactorily
8 identified the evidence undermining plaintiff's complaints. (Ct.
9 Rec. 21, pp. 13-15).

10 In this case the ALJ incorporated by reference the findings
11 of the two prior ALJ decisions, the first issued on December 29,
12 2000 by ALJ Paul Gaughan, and the second issued on October 10,
13 2003 by ALJ Richard Hines. (AR 634, 636). In the third and
14 current credibility assessment, ALJ Hines stated that he also
15 relied on plaintiff's failure to follow through with physical
16 therapy and failure to implement a fitness program as recommended;
17 on her ability to again fly from Washington to Texas despite
18 testifying that she can only sit for 5 minutes; on her ability to
19 drive; on progress notes indicating she was functioning fairly
20 well with respect to her depression; and on plaintiff's
21 participation in various activities. (AR 637). Although plaintiff
22 is correct that the ALJ does not provide specific record
23 references for each of these bases for his credibility
24 determination, each reason has support in the record sufficient
25 for review. Plaintiff failed to follow through with physical
26 therapy and refused to implement a physical fitness program
27 despite medical advice that she do so. (AR 1316) (October 10, 2003
28 decision). Plaintiff again flew to Texas despite testifying that

1 she can only sit for 5 minutes. (AR 1316) (October 10, 2003
2 decision). Plaintiff participated in a variety of activities,
3 including cooking, cleaning, doing laundry, driving, gardening and
4 watching television. (AR 1316) (October 10, 2003 decision). By
5 incorporating findings from past decisions which included
6 citations to the record, and by giving specific reasons supported
7 in the record for his credibility determination, the ALJ has
8 provided reasons sufficient for review.

9 Plaintiff next contends that the ALJ's reasons, even if
10 located in the record, are legally insufficient. (Ct. Rec. 17, pp.
11 38-40). The Commissioner responds that plaintiff only points to
12 two allegedly improper considerations with respect to the
13 credibility determination: the lack of follow through with
14 treatment and plaintiff's daily activities. (Ct. Rec. 21, pp. 15-
15 18). The Commissioner responds that the ALJ properly considered
16 both factors and both are supported by the record. (Ct. Rec. 21,
17 pp. 15-16). The Commissioner adds that the evidence the ALJ
18 relied on but not challenged by plaintiff also supports the ALJ's
19 credibility determination. (Ct. Rec. 21, pp. 18).

20 As noted previously, the ALJ considered the plaintiff's
21 failure to follow through with physical therapy for her back pain
22 and failure to implement a physical fitness program to benefit her
23 back pain and fibromyalgia as damaging to her credibility. (AR
24 637). Plaintiff argues that the ALJ cannot make a negative
25 credibility inference based on a lack of treatment without first
26 considering the claimant's explanation for the lack of treatment,
27 and in this case he did not ask her for an explanation. (Ct. Rec.
28 17, p. 39), citing SSR 96-7p. The Commissioner observes that the

1 amount of treatment is "an important indicator of the intensity
 2 and persistence of [Plaintiff's] symptoms." (Ct. Rec. 21, p. 15),
 3 citing C.F.R. § 416.929(c)(3).

4 Even if the ALJ improperly relied on plaintiff's lack of
 5 follow through with respect to physical therapy and a physical
 6 fitness program, the error is harmless because the other reasons
 7 relied upon by the ALJ are proper and are supported by substantial
 8 evidence.⁴

9 The ALJ observed that plaintiff's daily activities were
 10 inconsistent with her alleged limitations. (AR 637). This
 11 observation was based on plaintiff's ability to fly to Texas even
 12 though she testified that she is only able to sit for 5 minutes.
 13 Plaintiff had the ability to drive, as evidenced by the purchase
 14 of a new car. Medical records showed that plaintiff's foot
 15 problems were successfully corrected with surgery. There was no
 16 evidence showing that plaintiff needed a wheelchair or help with
 17 her daily activities until September 2003 when her psoriasis
 18 became severe. (AR 637). The Commissioner notes that by the
 19 incorporation of prior decisions, plaintiff's activities also
 20 included bicycle riding. (Ct. Rec. 21, p. 16, AR 1314, 1316, 28,
 21 33).

22 The ability to perform household activities bears on a
 23 claimant's credibility only to the extent that the level of
 24 activity is inconsistent with claimed limitations. See *Reddick v.*
 25 *Chater*, 157 F. 3d 715, 722 (9th Cir. 1998). In this case the ALJ

26
 27 ⁴An error is harmless when the correction of that error would not alter
 28 the result. See *Johnson v. Shalala*, 60 F. 3d 1428, 1436 n. 9 (9th Cir. 1995).
 Further, an ALJ's decision will not be reversed for errors that are harmless.
Burch v. Barnhart, 400 F. 3d 676, 679 (9th Cir. 2005) citing *Curry v. Sullivan*,
 925 F. 2d 1127, 1131 (9th Cir. 1991).

1 properly relied on substantial evidence of activities which were
2 inconsistent with plaintiff's claimed limitations.

3 A number of very specific reasons supporting the ALJ's
4 credibility findings were set forth in both the December 29, 2000
5 and the October 10, 2003 decisions which were by reference adopted
6 by and incorporated in the current decision. (AR 634, 636).
7 Plaintiff's inconsistent descriptions of her symptoms and
8 limitations undermined her credibility. The first ALJ noted that
9 plaintiff testified to shoulder problems without acknowledging
10 improvement after surgery, which weakened her general credibility.
11 (AR 39). The first ALJ found plaintiff's testimony that she could
12 only stand or walk for 15 minutes inconsistent with her June 1998
13 application that merely stated that she could not stand or walk
14 for long periods of time. (AR 39). The second decision, by ALJ
15 Hines, notes that "[a]lthough the claimant has reported an
16 inability to sit, stand and walk through the day, she evidences no
17 muscle wasting, strength loss, or atrophy on examination" as would
18 be expected. (AR 1316).

19 As noted, when an ALJ assesses credibility, he may consider
20 plaintiff's daily activities, such as the ability to perform
21 household chores, as a specific and convincing reason to discount
22 subjective complaints which are not consistent with that activity
23 level. *See Morgan v. Commissioner*, 169 F. 3d 595, 599-600 (9th
24 Cir. 1999). Evidence of probable malingering is another factor
25 properly supporting the ALJ's credibility determination. *See*
26 *Tonapetyan v. Halter*, 242 F. 3d 1144, 1148 (9th Cir. 2001)(a
27 tendency to exaggerate is a legitimate consideration in
28 determining credibility). Even under the clear and convincing

1 standard of review, the ALJ's determination that plaintiff is less
2 than completely credible is fully supported by the record.

3 **C. RFC**

4 Plaintiff next contends that the ALJ erred by failing to
5 specify the medical evidence relied upon in determining her
6 residual functional capacity ("RFC"). (Ct. Rec. 17, pp. 40-41).
7 Plaintiff argues, without any reference to the administrative
8 record, that the ALJ improperly rejected the opinions of her
9 treating health care providers and that no evidence supports the
10 RFC determination. (Ct. Rec. 17, pp. 40-41). The Commissioner
11 responds that the ALJ based plaintiff's RFC on a consideration of
12 the record as a whole, and because that evidence is substantial
13 and supports the RFC, there was no error. (Ct. Rec. 21, pp. 18-
14 19).

15 A treating physician's opinion is given special weight
16 because of familiarity with the claimant and the claimant's
17 physical condition. *Fair v. Bowen*, 885 F.2d 597, 604-05 (9th Cir.
18 1989). Thus, more weight is given to a treating physician than an
19 examining physician. *Lester*, 81 F.3d at 830. Correspondingly,
20 more weight is given to the opinions of treating and examining
21 physicians than to nonexamining physicians.

22 In addition to the testimony of a nonexamining medical
23 advisor, the ALJ must have other evidence to support a decision to
24 reject the opinion of a treating physician, such as laboratory
25 test results, contrary reports from examining physicians, and
26 testimony from the claimant that was inconsistent with the
27 treating physician's opinion. *Magallanes*, 881 F.2d at 751-52;
28 *Andrews*, 53 F.3d 1042-43. "An ALJ may reject the testimony of an

1 examining, but nontreating physician, in favor of a nonexamining,
2 nontreating physician when he gives specific, legitimate reasons
3 for doing so, and those reasons are supported by substantial
4 record evidence." *Roberts v. Shalala*, 66 F.3d 179, 184 (9th Cir.
5 1995)(citation omitted).

6 In the most recent decision the ALJ determined that, from
7 June 1998 until September 5, 2003, plaintiff had the residual
8 functional capacity to lift no more than 10 pounds frequently or
9 more than 20 pounds occasionally. Plaintiff could not work
10 overhead on the right side, and could only occasionally stoop. (AR
11 638). Plaintiff's moderately limited ability to maintain
12 concentration, persistence or pace precluded work requiring quotas
13 or prolonged concentration. The ALJ found that plaintiff was thus
14 precluded from work requiring more than a limited range of light
15 exertion. (AR 638).

16 The ALJ based this RFC, in part, on the evidence relied on by
17 the first ALJ, Paul L. Gaughan. The first hearing was held
18 December 28, 1999, approximately one year after the alleged onset
19 date of November 1998. ALJ Gaughan issued his decision on December
20 29, 2000. The ALJ incorporated these findings by reference into
21 the current decision. (AR 25-48; 634, 637).

22 In the first decision ALJ Gaughan determined that plaintiff's
23 RFC limited her to lifting or carrying 20 pounds occasionally and
24 not more than 10 pounds frequently, with no working at or above
25 shoulder level on the right. (AR 29). ALJ Gaughan based this RFC
26 on the following:

27 Plaintiff testified that she has carpal tunnel syndrome on
28 the right with accompanying numbness, but she told Dr. Lin [a

1 treating physician] in September 1999 that she had no difficulty
2 driving and only occasionally dropped items. (AR 29-30, 547).
3 Plaintiff testified that she can lift 10 pounds. (AR 29-30).
4 Electrodiagnostic evidence interpreted by Dr. Lin showed only mild
5 to moderate carpal tunnel syndrome on the right. (AR 31, 547).
6 The results of Dr. Damon's examination in September 2000 showed
7 good grip strength in both hands and full range of motion in the
8 elbows, hands and fingers bilaterally. (AR 32, 587). Plaintiff's
9 testimony that she cannot lift more than ten pounds in part
10 because of her history of a right rotator cuff tear is
11 inconsistent with treatment notes showing a good response to
12 surgical repair. (AR 39, 238, 479, 483-484). The orthopedic
13 specialist seen by plaintiff for her right hand complaints
14 recommended no more than an injection and a brace to wear at
15 night. (AR 42, 547). The ALJ noted that, although plaintiff's
16 right shoulder injury required surgery, her surgeon referred her
17 for only two to six therapy sessions because she was doing well
18 with home exercises. The surgeon opined that "she will be able to
19 return to work in the fall as a teacher." (AR 42, 484).

20 In the second decision (October 10, 2003), ALJ Hines noted
21 that in September 1998 treating physician Marilyn Ream, M.D., told
22 plaintiff that "her physical findings are not significant enough
23 to allow her to have disability." (AR 1311) (citing AR 243). The
24 ALJ pointed out Dr. Ream's opinion that plaintiff was able to
25 perform sedentary work. (AR 1311)(citing 394). The ALJ again
26 acknowledged plaintiff's March 1999 right shoulder open rotator
27 cuff repair and acromioplasty. He observed that in February of
28 2001, plaintiff reported that she did well following the surgery

1 in 1999, until the past couple of months. An ultrasound of the
2 right shoulder performed in February 2001 revealed a small
3 recurrent tear. Plaintiff was treated with injections without
4 followup. (AR 1311). In the second decision, ALJ Hines summarized
5 the evidence he relied on in determining plaintiff's physical RFC:

6 "It is noted that extensive testing, including brain, lumbar
7 spine and cervical spine MRIs, x-rays, ENG, audiogram, and nerve
8 conduction studies have evidenced no significant abnormalities.
9 The claimant has reported good relief of foot symptoms with
10 injections and treatment. Her shoulder condition was treated with
11 surgery, without recurrence until February of 2001, when the
12 claimant was treated with injections, without report of persisting
13 symptoms. There is no evidence to support the claimant's reports
14 of problems with vertigo or balance, and she did not undergo
15 physical therapy suggested for persisting balance problems. The
16 claimant's musculoskeletal complaints were considered to be
17 attributable to "age-related joint problems" or fibromyalgia. (see
18 Exhibit B-23F). [September 25, 2001 office note of J. Robert
19 Clark, M.D., at AR 1194.] The claimant has a past history of
20 mildly symptomatic right carpal tunnel syndrome, without evidence
21 of persisting symptoms. The evidence establishes that the claimant
22 suffers from foot impairment, right shoulder impairment, and
23 generalized musculoskeletal pain, considered together with her
24 mental impairment which exacerbates her physical condition,
25 precludes her ability to engage in work requiring lifting more
than 10 pounds frequently or more than 20 pounds occasionally,
working overhead with the right shoulder, or more than occasional
stooping. In addition, the claimant's limited ability to maintain
concentration, persistence or pace precludes her ability to engage
in work activities requiring quotas or prolonged concentration.
Accordingly, the undersigned finds that the claimant is unable to
perform work requiring more than a limited range of light
exertion. See, in accord, assessment of examining physician at
Exhibit 45F. [September 11, 2000 exam by James E. Damon, M.D., at
AR 586-588.] See, also, assessment of medical consultant at
Exhibit B-10F. [May 22, 2001 agency assessment by Cindy Kurtzhall
at AR 1099-1106.]

26 (AR 1317).

27 The RFC determination by ALJ Hines in the second decision
28 noted above is incorporated into the current (third) decision. As
is clear from the quoted portions of the second decision, the
prior decisions contain specific references to the medical
evidence of record. Plaintiff's argument that the current decision
does not provide a basis for review is unsupported by the record.

1 Plaintiff fails to point to specific evidence undermining the
2 ALJ's residual functional capacity assessment. With respect to
3 plaintiff's severe impairment of musculoskeletal pain, the
4 findings of the ALJs are fully supported by the record as noted
5 herein. To the extent that plaintiff argues that the RFC with
6 respect to her skin condition and depression were not properly
7 considered, the undersigned notes that in the current decision the
8 ALJ relied on the following:

9 1. Psoriasis

10 The ALJ found that plaintiff's skin disorder met the
11 requirements of a Listed impairment as of September 5, 2003, but
12 was not a disabling impairment before that time. (AR 636). In
13 reaching this conclusion, the ALJ observed that, while the
14 plaintiff had trouble with skin rashes on several occasions, "it
15 responded to treatment and healed." (AR 637). In the first
16 decision, ALJ Gaughan noted plaintiff's testimony "that she often
17 has shingles which spread all over with a burning sensation and
18 lasts up to 6 months," was inconsistent with the absence of
19 chronic skin complaints in the record. (AR 40). ALJ Gaughan
20 observed that after an outbreak on June 27, 1998, the condition
21 was already partially resolved by July 1, 1998. (AR 40)(citing AR
22 179, 184). The ALJ noted that it was not until September 1998
23 that plaintiff told Dr. Ream she thought the rash was returning
24 but Dr. Ream's records reveal no further complaints of serious
25 skin discomfort through April 1999. (AR 40)(citing AR 240-256).
26 The ALJ further noted that records from another physician through
27 September 1999 reflect complaints of rash like symptoms in one or
28 two areas at a time and there is no mention of serious burning

1 pain all over. (AR 40)(citing records of Michael Ryan, M.D., AR
2 266-291). Those records further indicated that after two weeks
3 the "rash has cleared completely." (AR 275).

4 The most recent decision incorporates the detailed findings
5 of the prior decisions. ALJ Hines summarized plaintiff's skin
6 condition in the past as having responded to treatment and healed.
7 (AR 637). The record contains substantial evidence supporting the
8 ALJ's finding that prior to September 5, 2003, plaintiff's skin
9 condition was not a disabling impairment and did not result in
10 limitations.

11 2. Mental Impairment

12 The current ALJ's decision found that plaintiff suffers from
13 psychological factors affecting her physical condition. This
14 mental impairment results in a mild restriction of activities of
15 daily living, mild difficulties in maintaining social functioning,
16 and moderate deficiencies of concentration, persistence, or pace,
17 with the latter limitation precluding plaintiff's ability to
18 engage in work requiring quotas or prolonged concentration. (AR
19 636, 638).

20 The ALJ indicated that the record supports the findings of
21 the prior decisions. He incorporates the prior ALJ decisions and
22 findings with respect to the opinions of Ronald Klein, Ph.D., who
23 testified at the second hearing, and of James Damon, M.D., and
24 James Bailey, Ph.D. (AR 1314-1315, 1476-1486, 586-588, 1107-1119).
25 Substantial evidence in the record supports the RFC finding with
26 respect to plaintiff's mental impairments.

27 James Damon, M.D., examined plaintiff September 11, 2000. He
28 noted that plaintiff brought a cane to the exam but did not use it

1 when walking around the room or getting on and off the examination
2 table. Plaintiff had a "severe conviction of impairment." (AR 586-
3 587). Dr. Damon opined that plaintiff's complaints far outweighed
4 the objective findings.

5 On May 23, 2001, James Bailey, Ph.D., assessed plaintiff with
6 only mild mental impairments. (AR 1117). Ronald Klein testified
7 that plaintiff suffers from a pain disorder with psychological
8 factors and a general medical condition not equal to a Listed
9 impairment. (AR 1476-1482). He opined that plaintiff is mildly
10 limited in activities of daily living, mildly limited in
11 maintaining social functioning, and moderately limited in
12 maintaining concentration, persistence or pace. (AR 1478). Dr.
13 Klein reviewed plaintiff's Weschler scores and noted that the
14 memory scores from ranged from 65 to 102, meaning that they ranged
15 from severely impaired to the middle of the average range. Dr.
16 Klein opined that this is highly unusual and not seen in a
17 neurologically intact individual. In the absence of stroke or
18 traumatic brain injury, the results "suggest the possibility of
19 inadequate effort, perhaps deliberate attempts to appear
20 disabled." (AR 1479). Dr. Klein reviewed plaintiff's scores on
21 several other tests and also found them highly suggestive of
22 inadequate effort and of a person trying to appear disabled. (AR
23 1478-1482). The ALJ appropriately relied on this medical evidence
24 in determining plaintiff's mental RFC.

25 Contrary to plaintiff's general argument, the ALJs credited
26 some of the opinions of her treating health providers when
27 determining her RFC. Beginning with the first ALJ's decision, some
28 of the findings of plaintiff's treating providers are credited.

1 ALJ Gaughan notes Marilee Manion, M.H.P.'s statement that when
2 plaintiff sought treatment in August of 1998, she was depressed in
3 large part because of a lack of job since returning to the United
4 States from Korea; loneliness since returning; and also because of
5 some health problems. Plaintiff said she had crying spells and was
6 unable to concentrate or comprehend because of racing thoughts.
7 (AR 35, citing AR 326). The ALJ notes that Ms. Manion reports on
8 August 24, 1998, that plaintiff's mood was good. Her thought
9 process was logical, progressive and goal directed. She was able
10 to perform serial sevens, which the ALJ notes indicated intact
11 concentration abilities. (AR 35, citing AR 330-333).

12 Similarly, the ALJ notes that plaintiff told treating
13 physician Dr. Ream in June 1999 that she had right foot pain when
14 getting up but it went away after walking a bit. (AR 30, citing AR
15 481). In each of the ALJ's decisions the opinions of treating,
16 examining and consulting doctors are considered, weighed and
17 discussed. The results of objective tests by many physicians are
18 exhaustively reviewed by the ALJs. In each decision plaintiff's
19 testimony is considered and discussed. In his current decision
20 ALJ Hines reviewed the entire record and incorporated prior ALJ
21 decisions and findings into his decision, and weighed plaintiff's
22 credibility in light of the credited medical evidence, along with
23 other appropriate factors. Based on the foregoing, the undersigned
24 finds that the ALJ's determination of plaintiff's RFC is based on
25 substantial record evidence and is free of legal error.

26 **D. Past Relevant Work**

27 Plaintiff contends that because the determination of her
28 residual functional capacity is flawed, the ALJ's hypothetical to

1 the vocational expert ("VE") is unsupported by substantial
 2 evidence and must be set aside. (Ct. Rec. 17, pp. 41-42). The
 3 Commissioner responds that plaintiff fails to meet her burden of
 4 proving that she can no longer perform her past relevant work, and
 5 because the ALJ's finding was based on substantial evidence, it
 6 should be upheld. (Ct. Rec. 21, pp. 19-20).

7 At the administrative hearing held on November 4, 2002,
 8 vocational expert ("VE") Daniel McKinney testified that an
 9 individual with the same age, education, work experience and RFC
 10 identified in the ALJ's hypothetical⁵ would be able to perform
 11 plaintiff's past relevant work as a teacher or secretary. (AR
 12 1516). As indicated herein, the ALJ's residual functional
 13 capacity analysis is free of legal error and supported by
 14 substantial evidence in the record. The hypothetical asked by the
 15 ALJ included all of the restrictions resulting from his RFC
 16 analysis. Accordingly, the ALJ appropriately relied on the VE's
 17 testimony in finding that plaintiff was able to perform her past
 18 relevant work during the applicable time frame.

19 Having reviewed the records and the ALJ's decision, this
 20 Court finds that the ALJ's decision is free from legal error and
 21 is based on substantial evidence of record. Accordingly,

22 **IT IS ORDERED:**

23 1. Defendant's Motion for Summary Judgment (**Ct. Rec. 20**) is
 24 **GRANTED.**

25 2. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 16**) is
 26 **DENIED.**

27
 28 ⁵The RFC to stand/sit for about 6 hours in an 8 hour day was assessed by
 agency consultant Cindy Kurtzhall on May 22, 2001. (AR 1100).

3. Judgment shall be entered for **DEFENDANT**.

4. The District Court Executive is directed to enter this Order, provide a copy to counsel for Plaintiff and Defendant, and **CLOSE** the file.

DATED this 21st day of December, 2006.

s/Michael W. Leavitt
MICHAEL W. LEAVITT
UNITED STATES MAGISTRATE JUDGE